IN THE HIGH COURT OF JUDICATURE AT MADRAS.

DATED: 12/12/2002

CORAM

THE HONOURABLE MR.JUSTICE N.V.BALASUBRAMANIAN.
AND
THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN.

WRIT PETITION NO. 4625 of 2001 AND WRIT PETITION NO.4626 of 2001

Tvl.New Krishna Bhavan,
rep by its Proprietor,
V.R.Krishnan,
201, Bazaar Street,
Vandavasi,
N.A.A.District. ...Petitioner in both W.Ps.

-VS-

1.The Deputy Commercial Tax Officer,
Vandavasi, N.A.A. District.

2.The Appellate Assistant Commissioner,
Vellore.

3.The Joint Commissioner III,
(S.M.R.) (CT), Chepauk,
Chennai. 600 005.

4.The Tamil Nadu Taxation
Special Tribunal,rep by its
Registrar, Chennai.600 001. ..... Respondents in both W.Ps.
...
Petitions filed under Article 226 of the Constitution of
India, praying to issue a Writ of Cetiorari,as stated therein.

!For Petitioner ..... Mr.Murali Kumaran
for M/s MeGan Law Firm.
in both W.Ps.

^For Respondents in Mr.T.Ayyasamy
Both W.Ps. ..... Spl.Govt.Pleader
for Taxes.

:ORDER

(Order of the Court was made by K.RAVIRAJA PANDIAN,J).

The two Writ Petitions are filed against the orders of the Special Tribunal made in O.P.No.714 of1998 dated 19.3.1998 and Tax Case Appeal No.4 of 1997 dated 5.1.2001.

2.The short facts for the disposal of the Writ Petitions are that the assessee is a hotelier. It reported a total and taxable turnover of Rs.5,80,827.95 and 'Nil' respectively for the assessment year 1989-90. On check of accounts, the Assessing Authority found several defects. The defects were that the sales per day has been suppressed and the normal sales were not disclosed that the gross profit of 33% was found to be too low that the purchases of raw materials were not covered by bill and the opening and closing stocks were not prepared and produced. Hence the Junior Research Officer conducted sales observation on 15.12.1989 and 6.3.1990. Having regard to the several defects, it was proposed to reject the returns and accounts as incorrect and incomplete and to determine the total taxable turnover according to the best judgment assessment. The sale on 15.12.1989 was Rs.3,514.75 and on 6.3.1990 was Rs.1,900.15. The average sale per day was worked out to Rs.2,708/- and the total sale for the year was worked out to Rs.9,83,004.00. It was found that all the purchases of provisions were made from unregistered dealer and not even a bought note, was prepared and produced. The Assessing Authority treated the purchases suppression of Rs.7,157/- as monthly purchases and multiplied the same by 12 for the entire year. Thus, the Assessing Authority arrived at a figure of Rs.90,884/-. He proceeded to assess the purchases at the appropriate rate by bringing the taxable turnover to Rs.10,73,888/-. As against that order, the writ petitioner filed an appeal before the first appellate authority-the Appellate Assistant Commissioner. The Appellate Assistant Commissioner held that the determination of Rs.9,83,004/- as sales turnover for the entire year was perfectly justified. However, with regard to the purchase turnover of Rs.90,884/-, he held that it was excessive and he adopted one time addition, thus arriving at a figure of Rs.14,314/-. In view of his modification in respect of the purchase addition, the total and taxable turnover came to Rs.9,97,318/-, being less than Rs.10,00,000/- and there was no tax liability on the assessee since the turnover upto Rs.1 0,00,000/- was exempted from tax by notification. The said order of the first Appellate Authority-Appellant Assistant Commissioner has been taken by the Joint Commissioner on suo motu revision. In the suo motu proceedings the Joint Commissioner proposed to revise the order of the Appellate Assistant Commissioner in so far as it related to Section 7A turnover. The petitioner was given an opportunity to file its objection. After hearing the objection, the Joint Commissioner justified the order of the Assessing Authority in estimating Section 7A turnover at 12 times. However, he found that for some of the goods like Sombu, Pepper, Jeera and Fried gram, no estimation was called for because these goods are normally from upcountry dealers and manufacturers and on that ground, he reduced the total turnover arrived at by the Assessing Officer to Rs.25,000/- and fixed the taxable turnover as Rs.10,08,004/-. That order was carried on appeal by the petitioner herein in Tax Case Appeal before the Special Tribunal. In the Tax Case Appeal, the one and the only contention raised by the writ petitioner was that when the Joint Commissioner has taken the order of the appellate authority for revision suo motu by considering a part of the order was prejudicial to the interest of the Revenue, the entire order including that part of the order, which went against the assessee has to be taken for the

purpose of revision and the petitioner should have been allowed to question the adverse part of the order notwithstanding the fact that objecting that portion of the order the petitioner has not filed any appeal. The Special Tribunal has negatived the submission on the ground that Section 34 of the Tamil Nadu General Sales Tax Act (hereinafter referred to as 'the Act') did not provide for any such contingency for the assessee to agitate that point, which went against him, in the suo motu proceedings subsequent to the amendment made to Section 34 of the Act. The correctness of the order of the Special Tribunal is challenged in the Writ Petition No.4626 of 2002 .

3.When the appeal was pending before the Special Tribunal, the petitioner filed O.P.714 of 1998 challenging the correctness of the order of the first Appellate Authority-Appellate Assistant Commissioner dated 7.8.1991, sustaining the order of assessment in respect of sales turnover in a sum of Rs.9,83,004/-. The Special Tribunal has dismissed the O.P on the ground that the order sought to be questioned in the O.P was taken on revision and orders were passed after hearing the petitioner. As against that order, the petitioner filed a statutory appeal before the Special Tribunal and obtained a stay order therein. Therefore, the O.P directed against the Appellate Assistant Commissioner is no longer suvives. The said order has been impugned in W.P.No.4 625 of 2001.

4.Mr.Murali Kumaran, learned counsel for the petitioner vehemently contended that even after the amendment introduced to Section 34 of the Act, whereby the provision has been modified to the effect that the Joint Commissioner could invoke the suo motu power only when he considered that the order of the Appellate Assistant Commissioner was prejudicial to the interest of the Revenue, it is open for the assessee to agitate that part of the order of the Appellate Assistant Commissioner, which went against the assessee before the Joint Commissioner even without filing an appeal against that part of the order. He further contended that the reasoning given by the Special Tribunal for non suiting the petitioner to challenge the order of the Appellate Assistant Commissioner dated 7.8.1991 in the Original Petition is not at all correct. The mere filing of an appeal against the order of the Joint Commissioner could not preclude the petitioner to agitate the correctness of the order passed by the Appellate Assistant Commissioner in a proceedings under Section 7 of the Special Tribunal Act.

5.On the other hand, the learned Government Pleader submitted that the order of the Assessing Officer itself is an order made on estimation, it is not as if the taxable turnover was arrived at on the basis of single day survey but the taxable turnover has been arrived at on the basis of survey conducted on two different dates and an average of two different dates sales has been taken as basis for calculating the taxable turnover and as such, no exception could be taken to this method. He further submitted that the argument of the learned counsel for the petitioner regarding the power of the Joint Commissioner in suo motu proceedings to consider the grievance of the petitioner in respect of the finding, which went against him in the order passed by the Appellate Tribunal also cannot be accepted, because of the judgment of the Division Bench of this Court as well as the decision of the Supreme Court, which has considered the scope of Section 34 of the Act, and held the assessee cannot invoke the suo motu provisions which imply that in a suo motu revision under Section 34 of the Act, the petitioner cannot agitate that part of the order, which was decided against him by the Appellate

Authority.
6.We heard the arguments of the learned counsel on either side and perused the materials on record.
7.The argument of the learned counsel Mr.Murali Kumaran that after initiating the suo motu proceedings by the Joint Commissioner under Section 34, it is open to the assessee to agitate before the Joint Commissioner that part of the appellate order, which went against the assessee cannot be accepted.
8.Under the scheme of the Act, the assessees are provided with an appellate remedy under Section 31, a second appellate remedy under Section 36 and Revisional remedy before the Special Tribunal under Section 38 of the Tamil Nadu General Sales Tax Act. Even if the assessee considered that the assessment order contained error apparent on the face of the record, he could invoke the provisions under Section 55 of the Act to rectify the errors. But if an order of assessment has been erroneously framed to the prejudice of the Revenue, there is no provision, which authorises the Revenue to take the matter on appeal. Hence as seen from Section 34, the suo motu revisional power is exclusively given to the Joint Commissioner to revise the order or proceedings recorded by the statutory authorities under Sections 4A, Section 12A, Section 14, Section 15 or sub-section (1) or (2) of Section 16 or an order passed by the Appellate Assistant Commissioner under subsection (3) of Section 31 or by the Appellate Deputy Commissioner under sub-section (3) of Section 31-A or by the Deputy Commissioner under sub-section (1) of Section 32 or sub-section (3) of Section 33, if such order or proceedings recorded is prejudicial to the interest of the Revenue. Under Section 34, no right is accrued to in favour of the assessee. But power is vested on the Joint Commissioner to correct the order, which he considered prejudicial to the Revenue. The language employed in the Section clearly indicates the intention of the Legislature to provide administrative machinery by which a higher Officer may review the orders of his subordinates and take necessary action upon such review. In that proceedings, we are of the view that it is not open to the assessee to agitate some other issue, which is not basis for the invocation of the suo motu revision.
9.When a question raised as to whether an assessee can invoke suo motu provision vested with the Deputy Commissioner under Section 32 of the TNGST Act which is identically worded as that of Section 34, this Court in the case of STATE OF TAMIL NADU .VS. SAMCO METALS AND ALLOYS (PRIVATE) LTD., (104 STC page 616) has held in unequivocal terms that the assessee could not invoke the revisional jurisdiction of the Deputy Commissioner to revise or modify the assessment. The Deputy Commissioner could revise the assessment only if he comes to the conclusion that the assessment made by the Officer was erroneous and prejudicial to the interest of the Revenue. The assessee could not say that the assessment made by the Assessing Officer was erroneous or prejudicial to the interest of the Revenue. Therefore, the assessee could not approach the Deputy Commissioner to invoke his revisional jurisdiction under Section 32.
10.The pari materia provision of the Andhra Preadesh General Sales Tax Act was the subject matter for consideration before the Supreme Court in the case of STATE OF ANDHRA PRADESH .VS. LAKSHMAIAH SETTY AND SONS (94 STC 190 (SC). In that case, the Supreme Court has held that the validity of assessment order must be tested by the aggrieved dealer in an appeal or

revision provided under the Act and in no other way. The dealer cannot invoke the suo motu power of the authorities. The suo motu power was conferred on higher authority to correct the errors of law or to correct improper or irregular procedure or illegality in the procedure to safeguard the interest of the Revenue as there was no express power given to the State to file an appeal against the order of assessment.

11.In the present case, it might be argued that since the assessee is aggrieved against the assessment order, by which the taxable turnover was arrived at more than Rs.10,00,000/- over and above the exempted limit, he filed an appeal before the appellate authority. Though the appellate authority has confirmed the sales turnover, which confirmation is against the interest of the assessee, however, reduced the purchase turnover thereby the taxable turnover was reduced to below Rs.10,00,000/- ,the exempted limit. Having regard to the exemption granted from payment of tax upto the turnover of Rs.10,00,000/- the assessee was not liable to pay tax. Hence he has not taken the adverse finding confirmed by the appellate authority in appeal. The need to agitate the adverse finding arose only when the order of appellate authority was taken in Revision suo-motu. Though the argument seems to be somewhat appealing on the first blush, if we construe the appellate provisions under Sections 31 and 36, the right of appeals are not restricted to the event of payment of tax arose. If the assessee is not accepting to the finding even when no tax liability arises, he can appeal against that finding. If the contention of the assessee is accepted that would amount to enlarge the scope of the provision of Section 34 by converting the same as another appeal in disguise, which cannot be legislative intend in enacting Section 34 and not permissible with regard to the language employed in the provision.

12.Even on merits also, we are of the view that the assessment itself is based on survey conducted on two different dates. Both the sales as well as purchase turnover have been arrived at by giving reasons by the assessing Officer, which was confirmed by the Joint Commissioner and further confirmed by the Special Tribunal. The Joint Commissioner has given a considerable relief in respect of the purchase of Menthi, sombu, pepper, Jeera, Fried Grams on the ground that those purchases are upcountry purchases. Hence in the order passed on estimation, this court while exercising the jurisdiction under Article 226 of the Constitution would seldom interfere unless or otherwise some glaring mistake has been pointed out by the assessee. In this case, the Assessing Authority has taken a reasonable view, which has been further affirmed by the Joint Commissioner in a suo motu revision. Obviously the first Appellate Authority has not taken into consideration of the purchase turnover in respect of the coffee powder and that was the reason for the initiation of the suo motu proceedings. When that being the position, we find no reason, much less any valid reason so as to interfere with the order passed in the appeal.

13.The other writ petition in W.P.No.4625 of 2001 is filed challenging the order of the Appellate Assistant Commissioner made on 7.8.199 1.That order was revised by the Joint Commissioner by his order dated 2.11.1995. As against that order, the petitioner filed an appeal in T.C.(A) No.4 of 1997 before the Special Tribunal. When the appeal was pending, the petitioner thought it fit to challenge the order of the Appellate Assistant Commissioner dated 7.8.1991 in the year 1998 by filing Original Petition under Section 7 of the Special Tribunal Act. We find no error in the order of the

Special Tribunal in dismissing the O.P for the reasons stated therein. When the order dated 7.8.1991 has been revised in the year 1995 and the revised order was also taken on appeal in the year 1997 and pending before the Special Tribunal, the petitioner cannot challenge the order dated 7.8.1991 in O.P. We have recorded our finding already on merits also. Hence there is no merit in the Writ Petition and it is also liable to be dismissed on the point of laches also.

14.Accordingly, both the Writ Petitions are dismissed.
However, there is no order as to costs.

Index:Yes.
Website:Yes.
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